No. 3753

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DOUGLAS FIR EXPLOITATION & EXPORT COMPANY (a corporation),

Plaintiff in Error,

vs.

W. LESLIE COMYN and BENJAMIN F. MACKALL, co-partners doing business under the firm name of COMYN, MACKALL & COMPANY,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

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Topical Index

Reference Table of Authorities Cited

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The Facts.

The contract is set forth in various letters exchanged between the parties. For convenience we have retained the designation of plaintiffs as such and of defendant as such as these parties appeared in the court below.

The complaint pleads defendant's confirmation of the order, which was as follows:

"Douglas Fir Exploitation & Export Co.
260 California Street
San Francisco, Cal. November 2, 1916.

Messrs. Comyn, Mackall & Co.,
310 California St.,
City.

Gentlemen:

Sold prior to October 11, 1916.

This will confirm sale to you of four cargoes Fir F. A. S. mill wharves as follows:

'W. H. Marston' 1300 M October to December 1917
'W. H. Talbot' 1300 M " " 1917

(Quotations subject to change without notice. All agreements are contingent upon the acts of God, riots, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes of delay beyond our control.)

and two of your own vessels to be named later, with a combined capacity of 1450 M, both for loading October to December, 1917, cargo to be furnished F. A. S. vessel at loading ports at 60 M daily in Puget Sound, Columbia or Willamette Rivers, Gray's Harbor and Willapa at our option, but one loading port only for each vessel, loading port to be named by us in ample time to give vessel instructions before leaving her next previous port of call.

Tally and inspection by Pacific Lumber Inspection Bureau at loading port. Certificate to be furnished and to be final. Price $9.50 base 'G' list less 2½%, 2½% cash. Marking if required, distinguishing mark at 10¢ per M. extra cost.

Written in duplicate. Please approve and return one copy.

Very truly yours,
Douglas Fir Exploitation & Export Co.,
By A. A. Baxter,
AAB-D General Manager."

(Italics ours.)

Thereafter plaintiffs approved this order (Record p. 68). On December 15, 1916, defendant sent the follow-

ing "acknowledgment of order", which was accepted by plaintiffs:

"Douglas Fir Exploitation & Export Co.
260 California St.,
San Francisco, Cal.

ACKNOWLEDGMENT OF ORDER.

Date December 8, 1916. Our No. 38 page 1
Your Order No.....Dated.....

Knappton Mills & Lumber Company.
Sold to Comyn, Mackall & Company.
For account of
To be delivered at Knappton, Wash.
For reshipment to
Time of shipment October to December, 1917.
Time of delivery do
Mill tally and inspection to govern and to be final. Agreements are contingent upon the acts of God, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes beyond our control. This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per his confirmation irrespective of original order unless advised to the contrary by you.

Sch. 'W. H. Marston'
1,300,000 feet B. M. 15% more or less to suit capacity of vessel.

Price: $9.50 Base 'G' List, less 2½% & 2½% for cash.

Destination: Australia. (Usual Australian Specifications)

Grade: As per 'G' List, P. L. I. B. Certificate to be furnished.

Delivery: 60 M feet per working day or pay demurrage as provided by Charter Party.

Marking: Marking if ordered, 10 cents per M, Net Cash.

Shipment: October to December, 1917.

Terms and
Conditions: As per 'G' List.
Notes: *This price is for delivery F. O. B. Mill Wharf, Knappton, within reach of vessel's tackles and/or on barges A. S. T. Mill Wharf, Knappton, Wash.''*

Accepted: Comyn, Mackall & Co.,
Per J. Claude Daly.
Dec. 28, 1916.''

(Italics ours.)

(Record p. 82.)

The document dated November 2, 1916, contains the phrase ''sold prior to October 11, 1916.'' It was shown on the trial that this referred to the following facts: Plaintiffs had entered into an engagement with The Chas. Nelson Company, set forth in the following letters:

''October Seventeenth, 1916.

Messrs. The Chas. Nelson Co.,
San Francisco, California.

Dear Sirs:

Confirming the writer's conversation with your Mr. Baxter today, we have purchased:

3500 M 10% more or less Oregon.

Shipment and/or loading—July to December, 1917.

Price: $10.00 per thousand base 'G' List less 2½ and 2½ f. a. s. mill.

Port of Loading—It is your option to load the above on Puget Sound, Columbia or Willamette Rivers or on Grays or Willapa Harbor, always provided of course that we have the right of loading at these places in Charter Party.

This contract is in duplicate, one of which we have signed, and shall be pleased if you will complete and return the other at your convenience.

Very truly yours,
Comyn, Mackall & Co.,
Per C. L. Daly.''

(Italics ours.)

"October Seventeenth, 1916.

Messrs. The Chas. Nelson Co.,
San Francisco, California.

Dear Sirs:

Referring to the contract enclosed covering purchase of 3500 M of Oregon it is probable that we will load under this contract the 'W. H. Marston' October/November/December and the 'W. H. Talbot' for the same loading. On both of these vessels we have the option of loading on Puget Sound or Columbia or Willamette Rivers. On the balance of the contract we may put in two (2) of our own vessels, estimated about 1450 M capacity, October/November/December, which can load at any of the several ports mentioned in the contract.

Very truly yours,
COMYN, MACKALL & Co.,
Per C. L. Daly."

(Record pp. 71-72.)

Defendant, which was a combination of lumber companies, of which The Charles Nelson Company was one, took over the obligation to deliver the lumber (Record pp. 74-5, 220). Defendant prepared the sales memorandum (Record p. 71) dated November 2, 1916 *(supra)*, wherein the two vessels were named which plaintiffs had indicated in their letter of October 17, 1916, as those which they would probably use for two cargoes. The names of the other two were to be furnished "later". At the date of the contract plaintiffs did not know what vessels they would use (Record pp. 76-7).

It should be noted (a) that the quantity was specified at 1300 M or 1,300,000 feet for the "Marston", 1000 M or 1,000,000 feet for the "Talbot", and 1450 M or 1,450,000 feet for the combined capacity of the other two vessels "to be named" (Record p. 80); (b) that

plaintiff acknowledged receipt *"of your sale note covering 3500 M 15% more or less October to December, 1917"*, and (c) that this confirmation was in turn acknowledged by defendant. The contract was thus made.

The defendant which selected the mills at which the lumber was to be cut thereupon notified plaintiffs as follows:

Plaintiffs' Exhibit No. 3.

"Douglas Fir Exploitation and Export Co.

December 15, 1916.

Comyn, Mackall & Co.,
City.

Gentlemen:

We enclose herewith the following orders:

Order #39-Schr. 'W. H. Talbot': We have placed this with the Raymond Lumber Co. of Raymond, Wash.

Order #40; Vessel to be named—725M: We have placed this cargo with the Hanify Co. at Raymond, Wash.

Order #41; Vessel to be named—725M: We have placed this with the Kleeb Lumber Co., South Bend, Wash.

Order #38: Schr. 'W. H. Marston': We have placed this cargo with the Knappton Mills and Lumber Co. at Knappton, Wash.

Would ask you to sign the acceptance copy of these orders and return same for our files.

Thanking you for the business, we remain,

Yours very truly,

Douglas Fir Exploitation & Export Co.,
By D. C. Thompson."

(Record pp. 80-81.)

These orders plaintiffs accepted.

In August and September, 1917, it became obvious that the "Marston" would not reach the Pacific Coast

before the end of the year, and that therefore plaintiffs would be unable to load her with the lumber which defendant had agreed to deliver.

In their letter of September 19, 1917, addressed to defendant plaintiffs enclosed specifications for 1,300,000 of lumber which they desired to load on to the "Marston", and asked for bills of lading, inspection certificate etc. (Record p. 91). Defendant having indicated a refusal to deliver the lumber because of the position of the "Marston", plaintiffs requested delivery f. a. s. mill wharf or on barges (Record p. 95).

Under date of October 1, 1917, defendant refused to make such delivery (Record p. 96).

Thereupon there were further requests (see plaintiffs' letter October 10, 1917, and October 23, 1917, Record pp. 97, 105) and refusals (defendant's letter October 12, 1917, and October 19, 1917, Record pp. 99, 100-101).

It thus appears that defendant took the position that it was not bound to deliver the lumber unless plaintiffs were prepared upon its receipt to load it on the "Marston". Plaintiffs claimed that they were entitled to the lumber on the mill wharf or on barges, regardless of the presence or absence of the "Marston". Defendant did not cut or cause the lumber to be cut although the specifications were furnished in ample time (Record pp. 274, 109-110), and refused to place it on the mill wharf or on barges, because plaintiffs were not ready to transfer it to the "Marston".

The lumber market had increased from the price named in the contract, $9.50 a thousand, to $22.50 a

thousand (Record p. 102). Plaintiffs supplied themselves in the open market, paying $22.50 a thousand or $17,511 (Record pp. 111 to 114) over the price fixed by their contract with defendant. Thereupon they brought this action.

The Issue.

The question presented for decision is the sole issue: Was it essential to plaintiffs' right to delivery of the lumber in question that the schooner "Marston" should be alongside the wharf at Knappton or alongside the barges when delivery of the lumber was demanded of defendant

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The Argument.

We respectfully submit that the question was correctly resolved in the opinion rendered by Judge Van Fleet upon demurrer to the complaint, and in the memorandum opinion filed by Judge Bean upon decision of the case.

The opinion of Judge Van Fleet, rendered October 21, 1918, was as follows:

> "The COURT (orally). This action arises out of a breach of contract for the delivery of certain lumber. The contract stipulated that the lumber was to be delivered at the wharf of a certain port, or on barges alongside the wharf, convenient to ship's tackle, and the contract specified the vessel by name. The complaint is demurred to upon the ground that it fails to state that the vessel mentioned in the contract was at the point of delivery at the time, the contention being that that is an essential feature of

the contract under the law, and that plaintiff must allege the presence of the vessel ready to receive the lumber. I am unable to give that construction to the contract. I think that the express provisions of not only the original contract but the subsequent notification that defendant was ready to deliver, which specifies the wharf or barges alongside the wharf as the place of delivery, is the substantive requirement of the contract; that the provision as to the lumber being delivered convenient to ship's tackle was one which was for the benefit of the plaintiff here, the party who would receive the delivery, and it is not one upon which the defendant may rely. The demurrer will accordingly be overruled."

The opinion of Judge Bean, rendered in this case on December 28, 1920, was as follows:

"Memorandum by Bean, District Judge:

As appears from the findings of fact herewith filed, the single question for decision is whether the failure of plaintiff to have the Marston at the mill wharf ready to receive cargo within the delivery dates specified in the contract relieved the defendant from the obligation to make delivery as demanded. In other words, whether the plaintiff could legally require delivery without furnishing the named vessel as the receiving medium. This question in substance was decided by Judge Van Fleet adversely to defendant on demurrer to the complaint. In his opinion I fully concur. The naming of the vessel in the contract, in my judgment, was a stipulation for the benefit of plaintiff and could be waived by it. (Ellsworth v. Knowles, 97 Pac. 690; Meyer v. Sullivan, 181 Pac. 847; Harrison v. Fortlage, 161 U. S. 64.) It does not affect the identity of the subject matter nor the time and place of delivery. The failure of plaintiff to furnish the named vessel did not add anything to the obligations of defendant. It was in no way important to it wheth-

er the buyer transferred the lumber to the Marston or to some other carrier, so long as it did not impose upon it any additional expense or undue delay. It would have fully discharged all the obligation on its part if it had cut and delivered the lumber on the wharf or on barge as demanded by plaintiff. The fact that the parties contemplated that the lumber would be loaded on the Marston did not make the Marston a necessary feature of the performance of the contract by defendant, or a condition precedent to defendant's obligation to make delivery. The provision f. o. b. mill wharf 'within reach of ship's tackles' or 'on barges a. s. t. mill wharf' did not affect the seller's obligation to deliver on the mill wharf or on barges. The delivery would be complete and its obligations discharged as soon as the lumber was placed on the mill wharf or on barges at mill wharf and accepted by plaintiff. It was wholly immaterial whether plaintiff used the Marston or some other receiving medium for shipment of the lumber.

It is claimed that the contract was for a cargo sale and that the capacity of the Marston was the measure of the quantity to be delivered but the contract names the quantity, and the expression therein '15% more or less to suit capacity of vessel' would simply allow the specified quantity to be varied to that extent, if the named vessel had been tendered as the receiving medium, but the failure to tender it would not relieve the defendant from making delivery if demanded of the specified quantity.

It is also said that the time and place of delivery was affected by the naming of the Marston, but these matters are both fixed by the contract, and plaintiff offered to take delivery as therein specified.

Defendant's motions for nonsuit and directed verdict are therefore denied and overruled, and judgment will be entered for plaintiff as prayed for."

These decisions sustain our contention that as the delivery contracted for was "f. o. b. mill wharf" "and/or

on barges mill wharf", the fact that the "Marston" was not there could not justify defendant's refusal to make the delivery; that the provision that the delivery should be within reach of the "Marston's" tackles was wholly for the plaintiffs' benefit; that the "Marston's" presence was not a condition precedent which would justify either party in refusing to perform; that if it was a condition precedent, being for plaintiffs' benefit, plaintiffs could waive the condition.

The naming of the vessel here in no way affected or conditioned defendant's performance of the contract. The cases where deliveries are to be f. o. b. a vessel, so that without the presence of the vessel performance is obviously impossible, are not analogous (infra).

As we have seen, the contract is contained in the two instruments, one dated November 2, 1916, and one dated December 8, 1916, which we have quoted. The first instrument provides for the sale of four cargoes mill wharf free alongside ship as follows:

"W. H. Marston" 1300 M October to December, 1917,

"W. H. Talbot" 1000 M October to December, 1917,

and two vessels "to be named later,* with a combined capacity of 1450 M, both for loading October to December, 1917".

In the document dated December 8, 1916 (which it is provided shall supersede the earlier paper), and which contains the acknowledgment of the order, it is provided that the cargo is to be delivered at Knappton, Washington. The closing paragraph is:

* Which indicates the immateriality to the seller of the names of the vessels.

"This price is for delivery f. o. b. mill wharf, Knappton, within reach of vessel's tackles and/or on barges a. s. t. mill wharf, Knappton, Wash."

We submit that the mention of the schooner "Marston" in these instruments neither fixed the quality of the cargo to be delivered, nor the quantity, nor the time of delivery nor the place of delivery.

The defendant selected the mills at which the lumber was to be cut. For each lot of lumber it issued a separate acknowledgment of order. It is interesting to note that the contracts for lumber which plaintiffs intended to load on the vessels *not known to them or named by them* are in the precise form of the acknowledgment of the order for the lumber which plaintiffs wished to load on the "Marston".

One of these acknowledgments appears in the record (Record pp. 86-87) with a stipulation that the other was in similar form. We quote the one appearing in the record:

Plaintiff's Exhibit No. 6.

"Acknowledgment of Order.

Douglas Fir Exploitation & Export Co.
260 California St.
San Francisco, Cal.

Our No. 41, page 1.
Date December 8, 1916.
Your Order No.....
Dated.....

Kleeb Lumber Company.

Sold to—Comyn, Mackall & Company.
For Account of—
To be delivered at South Bend, Wash.
For reshipment to—
Time of Shipment October-July to December, 1917.
Time of Delivery do

Mill tally and inspection to govern and to be final.

Agreements are contingent upon the acts of God, strikes, lock-outs, fires, floods, accidents, inability to secure cars, transportation or other causes beyond our control. This is a confirmation of your order as we understand it. Please check each item with your original order and advise us promptly of any errors. Read carefully the special notes in our price list. Shipment will be made as per confirmation irrespective of original order unless advised to the contrary by you.

Pieces. Feet. Size. Length. Description.

VESSELS TO BE NAMED.

725,000 feet B. M. 15% more or less to suit capacity of vessel.

Price: $9.50 Base 'G' List, less 2½% & 2½% for cash.

Destination: Australia or West Coast. (Usual Specifications.)

Grade: As per 'G' list, P. L. I. B. Certificate to be furnished.

Delivery: 60 M feet per working day or pay demurrage as provided by Charter Party.

Marking: Marking if ordered, 10 cents per M, Net Cash.

Shipment: October-July to December, 1917.

Terms and Conditions: As per 'G' list (Our letter A 425).

Notes: This price is for delivery F. O. B. Mill Wharf, South Bend, Wash., within reach of vessel's tackles and/or on barges A. S. T. Mill Wharf, South Bend, Wash.

Accepted: Comyn, Mackall & Co.
Per J. Claude Daly.

Dec. 28, 1916.

Please return for our files:
Douglas Fir Exploitation & Export Co.

Note
Refer to E. G.
O. K.—E. R. G."

(Record pp. 86-87.)

A case very similar to the case at bar is *Meyer v. Sullivan,* 40 Cal. App. 723; 181 Pac. 847. There a sale was of 250 tons of wheat f. o. b. Kosmos line steamer. No Kosmos liner could be produced. Buyer demanded delivery "in the manner customary on Puget Sound, viz., in warehouse there". The court held that delivery on the steamer was for the buyer's benefit, and that the seller could not avoid his contract because the steamer was not there. The court there said:

> "The witnesses on the part of the defendants testified as to the use of the terms f. o. b. and 'f. a. s.' (free-along-side) in contracts. The evidence discloses that contracts might be made, between buyer and seller, using either of these terms, although sales f. a. s. seem to be of infrequent occurrence, and not readily made in the community. In both f. a. s. sales and f. o. b. sales, however, the seller of the goods pays the cost of all handling on the dock; and the cost of stevedoring, or transferring the cargo from the dock to the ship is paid and absorbed by the shipowner from the freight, which in turn is paid by the buyer. The only distinction between the two kinds of sales appears to be as to the time when the responsibility of the seller ends. In the case of f. a. s. sales, it seems to end with delivery on the dock. In the case of f. o. b. sales, the responsibility of the seller appears to end when the commodity is on board ship. The element of cost, to either buyer or seller, does not appear to enter into the matter at all."

And again:

> "In arriving at this conclusion, the trial court was assisted by the position of the clause in the contracts, used, as it was, in connection with the words fixing the price of the wheat sold. The general rule seems to be that

> 'If the agreement is to sell goods "f. o. b." at a designated place, such place will ordinarily be regarded as the place of delivery, but the effect of the "f. o. b." depends on the connection in which it is used, and if used in connection with the words fixing the price only, it will not be construed as fixing the place of delivery.' 35 Cyc. 174; Neimeyer Lumber Co. v. Burlington & M. R. R. Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534; Burton et al. v. Nacogdoches Lumber Co. (Tex. Civ. App.), 161 S. W. 25.
>
> In Dannemiller v. Kirkpatrick, 201 Pa. St. 218, 50 Atl. 928, the contract read: 'Bill the cargo of coffee at the same price, f. o. b. Pittsburgh.' It was held that whether or not delivery was to be made at Pittsburgh was a question of fact. To like effect are Consolidated Coal Co. v. Schneider, 163 Ill. 393, 45 N. E. 126; Davis v. Alpha Portland Cement Co. (C. C.), 134 Fed. 274; U. S. Smelting Co. v. American Galvanizing Co. (D. C.), 236 Fed. 596. These authorities seem to firmly establish the rule that the f. o. b. clause may be used solely with reference to the price. The finding of the court that the term '$1.43⅓ per 100 lbs. f. o. b. Kosmos steamer, Seattle', in one contract, and the like clause in the other, as between plaintiffs and defendants, must be held to refer to the price and not to the place of delivery, seems to us to be fully supported by the testimony."

Counsel for defendant quote us as having said that where the delivery is f. o. b. a vessel, some vessel must be tendered. We believe that to be the broad rule. But furthermore, in a sale f. o. b. vessel, *the vessel is not material* if the stipulation f. o. b. vessel is primarily a price term. That was the case in *Meyer v. Sullivan,* and that is this case. "F" in "f. a. s." means *free*—that is, without further charge; it means that included

in the price of the lumber is the cost of placing it on the dock; it is there *free* along side.

And so, in *Meyer v. Sullivan,* the court found that in the phrase "f. o. b. Kosmos liner", the reference to the liner was primarily to indicate at what point the wheat should be free to the buyer. The mention of the liner was part of the price terms rather than an insertion of a condition precedent to delivery.

So here the documents in their origin show that the phrase "f. a. s. mill" was a price term. If the court will turn to the original sale memorandum of October 17, 1916 (Plffs. Exh. 2, Record), it will find in it "Price $10.00 per thousand base 'G' list less 2½ and 2½ f. a. s. mill". And to the final order under "notes", which says:

> "*This price* is for delivery *f. o. b. mill wharf* Knappton within reach of vessel's tackles and/or on barges a. s. t. mill wharf Knappton, Wash." (Plffs. Exh. 4; also complaint, Record p. 6);

so that these phrases "f. o. b. mill wharf" and "on barges a. s. t." were *price* terms, not covenants constituting conditions precedent to delivery (Record p. 89, pp. 142-144).

We submit the instant case is indistinguishable from *Meyer v. Sullivan.*

Delivery on the wharf or on barges would have constituted full performance by the defendant of defendant's obligations under the contract (Record p. 89). The fact that the parties *contemplated* that the lumber would be loaded on the "Marston" did not make the "Marston" a necessary factor in the performance of the con-

tract, or her presence a condition precedent to defendant's obligation to deliver the lumber to the plaintiffs on the wharf or on barges.

The provision "within reach of vessel's tackles" did not affect the seller's obligation to deliver on the mill wharf, or on barges at mill wharf. If the lumber had been placed on the mill wharf or on barges at the mill wharf the delivery would have been complete. Suppose the "Marston" had been actually at the mill wharf, and delivery had been made on the mill wharf, and instead of loading the lumber onto the "Marston" the plaintiffs chose to load it onto barges, or chose to put it into rafts. Could the defendant have complained? Clearly not.

In *Norrington v. Wright,* 115 U. S. 188, 203, it is pointed out that

> "A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract."

Tested by this statement, the naming of the "Marston" described neither the subject-matter, i. e., the lumber, nor the time nor the place of shipment, all of which are fixed by other express stipulations in the contract.

It is because of the principle announced in *Norrington v. Wright* that the designation of a vessel as the ship by which a cargo is to arrive has been frequently held

to control performance of the contract. Where a cargo is sold to arrive by a certain vessel, both the time of the performance and the identity of the subject-matter are governed by the shipment by the designated vessel. In such cases the naming of the vessel is a material condition of the contract, upon which the aggrieved party, in case of failure, may stand.

In this case the naming of the "Marston" falls clearly in the class of cases which provide that a provision in a contract may be waived by the party for whose benefit it is inserted.

> "It is a well-settled maxim that a party may waive the benefit of any condition or provision made in his behalf, no matter in what manner it may have been made or secured."
>
> *Broom's Legal Maxims,* p. 547;
>
> *Knarston v. Manhattan Life Ins. Co.,* 140 Cal. 57, 63;
>
> *Collins v. Ramish* (Cal.), 188 Pac. 550, 551.

The question of what is a condition precedent, and what is a stipulation, is discussed in *Behn v. Burness,* 32 L. J. Q. B. 204; 122 Eng. Rep., Reprint, p. 281. In that case the statement in the charter party that the ship "is now in the port of Amsterdam" was held to be a condition which became an integral part of the contract, and not merely a representation, and that consequently the contract was broken, the representation having proven to be untrue. The court said:

> "A question, however, may arise, whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of con-

> struction which the court, and not the jury, must determine. If the court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. * * * With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition on the failure or nonperformance of which the other party may, if he is so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favor."

An instructive case is *Neill v. Whitworth,* L. R. 1 C. P. 684, 144 Eng. Rep., Reprint, p. 513. In that case the question was on a bought-note, reading as follows:

> "Bought for account of Messrs. Neill Brothers, of B. Whitworth & Brothers, Manchester, 500 bales of cotton, at 15-1/8 d. per lb., guaranteed October shipment, to arrive in Liverpool per ship or ships from Calcutta.
>
> The cotton guaranteed fair Bengal. Any slight variation in mark not to vitiate this contract. In case of dispute arising out of this contract, the matter to be referred to two respectable brokers, who shall decide as to quality, and the allowance, if any, to be made.

The cotton to be taken from the quay; customary allowance of tare and draft; and the invoice to be dated from date of delivery of last bale.

To be in merchantable condition; the damaged, if any, to be rejected, provided it cannot be made merchantable. Should the cotton be transshipped into other vessels arriving, the contract to hold good; but, if any of the vessels be lost, the contract to be void, so far as regards such ships only.

Payment, cash within ten days, made equal to ten days and three months. Cash on account, before delivery, if required.

Trueman & Rouse."

The cargo, having arrived, was landed on the quay at Liverpool and subsequently warehoused. Delivery orders were not given to the plaintiffs until after the cotton had been carried to the warehouse. Subsequently the vendors offered to deliver the whole 500 bales from the warehouse at quay weights, or to cart them back to the quay and deliver them there. Plaintiffs refused to take the cotton, insisting that the defendants had broken their contract by allowing the cotton to be warehoused instead of delivering it on arrival from the quay. Counsel for the defendants took the position that the provision that the buyers were to take the cotton from the quay did not amount to a condition binding the sellers to deliver on the quay, but merely to a stipulation for their advantage, that, if they chose so to deliver, the vendees should be there ready to receive it,

"the object being that the vendors shall not be at the charge of warehouse rent, risk of fire, and the like. The distinction between stipulations which are conditions precedent and those which may be compensated for by damages in a cross-action is

very elaborately discussed by Williams, J., in a judgment delivered by him in the Exchequer Chamber in a case of Behn v. Burness, 32 Law J., Q. B. 204, the result of which shows that this was a mere stipulation introduced for the benefit of the sellers. Whether particular terms of delivery amount to a condition precedent or not, depends, according to the judgment of Lord Ellenborough in Ritchie v. Atkinson, 10 East 295, 306, 'not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract'."

The court, by Erle, C. J., Williams, J., Willes, J., and Keating, J., sustained this opinion. Erle, C. J., said that the question was whether the contract between the parties contained a condition precedent, to be performed by the vendors before they could call upon the vendees to accept the cotton, and the court said:

"The words relied on as constituting a condition precedent are, 'The cotton to be taken from the quay.' It was in fact landed and warehoused; and the plaintiffs, finding that it had been taken to the warehouse, refused to receive it, although the defendants offered to deliver it to them at quay weights, and even to cart it back to the quay free of expense. The law upon the subject of what does and what does not amount to a condition precedent, or only to an independent stipulation, is laid down with much clearness by my Brother Williams in a very elaborate judgment delivered by him in the Exchequer Chamber in the recent case of Behn v. Burness, 4 Best & Smith 296. *The distinctions there pointed out are well worthy of attention. Looking at the contract now before us with the light afforded by that case, I am of opinion that the clause in question constitutes an independent stipulation introduced solely for the benefit of the vendors, and therefore is matter on which the ven-*

dees cannot rely as amounting to a condition precedent. See the nature of the contract. It is a contract by bought and sold notes for 500 bales of cotton to arrive, at a certain price and of a certain quality. Then comes a stipulation that, 'in case of dispute arising out of this contract, the matter shall be referred to two respectable brokers, who shall decide as to quality, and the allowance, if any, to be made'. Then come the words in question,—'The cotton to be taken from the quay.' This comes after the more operative words, and among some provisions which are inserted in favor of the vendors. Looking at the nature of the stipulation itself, *I cannot see how it can be of any importance to the vendees whether they receive the cotton from the quay or from the warehouse,* provided the warehousing does not impose on them any additional expense or undue delay. *It seems to me to be perfectly clear that it was a stipulation inserted for the benefit of the vendors, to enable them to call upon the vendees to take the cotton from the quay, in order to save them expense.* I am also clearly of opinion that it was not intended to operate as a stipulation for time. There is nothing to show that the whole number of bales stipulated for were to be delivered out of the ship the moment she arrived; they might be the first 250 unloaded, or the last. I see nothing, therefore, in the stipulation which points to the time of delivery, or shows that it was for the benefit of the vendees; and I do see very good reason why the vendors should make it. I am therefore of opinion that it was not a condition precedent, that there has been no breach of the contract on the part of the vendors, and consequently that this action will not lie."

Willes, J., in concurring, came to the same conclusion on the following grounds, saying there were several reasons for holding that the clause could not be considered as a condition precedent:

> "*The stipulation does not affect the identity of the cotton, or its quantity, or its quality,—as, for instance, that it should be cotton from Mobile or from New Orleans, or the like. Then, does it amount to a stipulation as to time. Without it, the contract would stand as a contract for the delivery of the cotton within a reasonable time.* The words were evidently introduced with reference amongst other things to who was to be at the charge of the warehouse-rent, insurance, etc. These would otherwise have been at large. There was, therefore, a manifest use for the words 'the cotton to be taken from the quay'. The meaning of them is that the quay is to be taken as the place at which the delivery is to be made. This construction is fortified by the provision made for the usual allowance, and the stipulation that the invoice is to date from the delivery of the last bale. That must mean from the time the last bale is landed on the quay. The contract, therefore, stands as a contract for the delivery of the cotton in a reasonable time and under reasonable circumstances, the cotton to be at the buyers' charge from the time it is landed on the quay. That seems to me to be the proper construction; and it is the construction which the sellers have put upon it."

It is obvious that in this case the lifting of the lumber from the place of delivery on board the "Marston" is no part of the consideration moving to the vendors, and according to the tests applied by Willes, J., in Neill v. Whitworth, affects neither the time, place, quantity nor quality of the article to be delivered.

A very important case here is *Thornton v. Simpson,* 2 Marsh. 267; 128 Eng. Rep. p. 1151. There there was a contract to sell fifty tons of hemp at a price per ton, to be shipped from St. Petersburgh or Cronstadt, in June or July, and *the ship's* name declared as soon as

known; in case *the ship* did not arrive before December 31st, the contract to be void. The seller in that case, believing that the fifty tons of hemp contracted for had been shipped at St. Petersburgh on board the "Lively", so advised the defendants. The "Lively", however, only took twenty tons of the fifty tons in question, and twenty-four tons for others. Thereupon, some months later, the sellers advised the defendants that they reserved the option of making up the deficiency on the "Unity" or the "Paragon", both from St. Petersburgh. The defendants refused to accept hemp from the latter vessels, and insisted on fifty tons from the "Lively". Plaintiffs then sold thirty tons, which they had brought by other vessels, at a loss and sued the vendees for their damages. The report of the case discloses the questions involved:

> "Gibbs, C. J. Three objections are taken to the plaintiffs' right to recover: 1st, that the plaintiffs were not at liberty to send the hemp by more ships than one; 2ndly, that after having given notice of the ship that was bringing the goods, the plaintiffs were bound by their election, and could not give notice of another ship; 3rdly, that the plaintiffs violated their contract in not giving the defendants all that came by the 'Lively'. All these objections stand on different grounds. As to the 1st question, whether if the plaintiffs had in the first instance given notice that half the hemp was coming by the 'Lively', and half by the 'Paragon', the defendants could have refused to accept it, I think they could not. The material thing is the time of delivery; it was at all events to be before the 31st of December, but by what *ships* the hemp was to come was immaterial. As to the second question, we must look at the terms of the contract. 'The name of the ship', which I have assumed as equivalent to *ships,* 'to be

declared as soon as known'. *In September, four months before the delivery must necessarily be completed, the plaintiffs thought they knew by what ship the hemp was coming, and gave notice, but they were deceived. The question is, then, whether the defendants are not bound by the second nomination and I think they were. They were not prejudiced,* they had taken no steps upon the first notice. As to the third question, I think, whatever part of the 50 tons purchased for the defendants, the plaintiffs received by the 'Lively', they were bound to deliver to the defendants; but whatever part of the 50 tons they did not receive by the 'Lively', they were at liberty to make up out of the 'Unity' and 'Paragon'. It is true the plaintiffs had other hemp by the 'Lively', besides the 20 tons, but they had ascribed that other hemp to other purchasers, and the defendants had no right to say that hemp ought to be delivered to them. I therefore think the rule ought to be discharged.

Dalles, J. In this case there are three questions. As to the 1st, if the words be doubtful, we must look to the substance of the contract, and I think that has been complied with. *It is said, that instead of sending the hemp by ship or ships, the plaintiffs are bound to one ship only.* At first they were at liberty to send by any ship, the contract not saying that the goods shall come by the first ship, nor naming any ship; therefore the substance of the contract is, that it need not come by any particular ship. As to the 2nd point, I think the plaintiffs were at liberty to give the second notice. As to the 3d, the plaintiffs having contracted to sell the other parts of the cargo of the 'Lively' to other persons, did all they were bound to do, in delivering the 20 tons to the plaintiffs.

Park, J., was of the same opinion. The plaintiffs were at liberty to send the hemp by any ships, so that it arrived before 31st December. As to the 3d point, the case must be considered as if there were

only 20 tons on board this ship, and the contract has been substantially complied with.

Burrough, J., concurring, the rule was discharged."

In *Reade v. Meniaeff,* 7 C. B. 159; 137 Eng. Rep. Reprint, p. 57, there were two contracts, by which the defendants engaged to ship at Cronstadt, for the plaintiffs, 250 tons and 350 tons, respectively, of rye meal. Each contract stipulated that the shipments should be made at the first open water, allowing a fair and reasonable time for the arrival out of the vessel, and getting the goods down to Cronstadt; that payment should be made one-third at three months from the date of bill of lading, but that, should the vessel not arrive in time for the goods to be shipped before the 30th of June, or the sellers not be able to procure a ship by that date, the sellers should draw for the remainder as specified above. The buyers sent out three vessels, no one of which was of sufficient capacity to take on board the quantity mentioned in either contract, and which arrived at the port of loading at different times. *The sellers claimed that this was a breach of condition precedent, and that the buyers, by the terms of the contract, were obligated to send a single ship for each cargo.* It was held that the buyers could maintain their action, although they did not send out one vessel. The opinions by the court were by Maule, J., Cresswell, J., V. Williams, J., and Wilde, C. J. The court said:

"The question upon both pleas turns mainly upon the meaning of the contract,—whether the plaintiffs could perform all that they were bound to do by way of condition precedent, without sending out

one vessel to receive the quantity of meal mentioned in each contract. The contracts were to this effect: 'Sold for P. Meniaeff & Son, 250 tons (20 tons more or less to be no object) of Russian kiln-dried rye meal, in mat bags, sweet and in good condition when shipped, at £8 7s. 6d. per ton, free on board at Cronstadt. *Shipment to be made at the first open water, allowing a fair and reasonable time for the arrival out of the vessel,* and getting the goods down to Cronstadt. The sellers, if required by the buyers, to take ship-room at St. Petersburgh, at the current rate of freight, for account of the buyers; to be paid for by the buyers' acceptance of the sellers', or agents', drafts, one-third of the above sale at three months from the date of the contract, and the remainder by their acceptance at three months from the date of the bill of lading, on handing the same. But, should the vessel not arrive in time for the meal to be shipped by the 30th of June then next, or the sellers not be able to provide *a ship* by that date, then the sellers should be at liberty to draw for the remainder, as specified above', etc. The contract for the 350 tons was in similar terms.

Now, these are mercantile contracts between two dealers, for the shipment of goods from a foreign port. The substance of the contracts is, I think, this,—that 250 and 350 tons of meal, respectively, were to be shipped at Cronstadt, for Reade & Co. The defendants were to put it on board at Cronstadt; and, further, if required, were to take up ship-room at St. Petersburgh, at the current rate of freight. *That is a stipulation for the benefit of the buyers.* The buyers were to pay for the meal, one-third by acceptance at three months from the date of the contract (which has been done), and the residue by acceptance at three months from the date of the bill of lading, on handing the same. There is no stipulation here, on the part of the buyers, that they will send a ship, or anything of the kind. But for an expression I will presently advert to, the effect

would be, that the buyers might point out any reasonable mode of shipping the goods they pleased,—whether in one ship or in more. That would have been beyond doubt, if, in speaking of the mode of payment, the contract had not said that the residue was to be paid for by acceptance at three months from the date of the bill of lading,—and, further, that, should the vessel not arrive in time for the meal to be shipped by the 30th of June then next, or the sellers not be able to provide a ship by that date, then the sellers should be at liberty to draw for the remainder as specified above. That is, if the buyers do not send a ship in time, or the sellers cannot engage ship-room at St. Petersburgh, the latter were to draw for the balance, although the meal should not have been shipped. *There is no agreement, in terms, that the plaintiffs shall send out a vessel. The use of the words 'the vessel' and 'the bill of lading', may be considered reasonably to show the parties contemplated that the plaintiff would send out one ship only to receive the quantity mentioned in each contract.* That being the probable state of things *they contemplated (but did not stipulate for), they in terms provide for that mode of performance. It seems to me, however, that we should be giving an undue degree of narrowness to the construction of a contract of this sort, if we were to hold the buyers bound to adopt that mode of performance as a condition precedent* to the right to maintain an action against the sellers for a breach of the contract on their part. * * * If the construction I suggest be the true one,—and I have no doubt it is,—the circumstance of a single ship not having been sent to receive *the meal which was the subject-matter of each contract,* does not show that there has been a failure of performance of anything that ought to have been performed by the plaintiffs; there is, therefore, no inconsistency in saying that the plaintiffs have performed the contract in all things on their part, although they sent three ships, no one of which was of capacity sufficient to take

on board the entire subject-matter of each contract. I therefore think that the verdict on these two issues was properly entered for the plaintiffs."

Cresswell, J., said:

"As to the second action,—*there was no express bargain between the parties that one ship,* and one ship only, should be sent to Cronstadt, to receive the quantity of meal comprised in each contract. The whole argument arises from the use of the words 'ship' and 'bill of lading', in the singular number. *We may infer that, at the time of entering into the contracts, the parties contemplated that one ship only should receive each lot; but not that the plaintiffs contracted, as a condition precedent, that this should be done.* I think there was abundant evidence that the plaintiffs were ready and willing to perform the contracts in all that they were bound to perform."

In *Bourne v. Seymour,* 16 C. B. 349; 139 Eng. Rep., Reprint, p. 788, a contract for "about 500 tons of nitrate of soda", contained the further provision that "*it is understood that the above nitrate of soda is to form the full and complete cargo of the 'John Phillips',*" and also the further provision that if the "John Phillips" should go ashore, or be unable to prosecute her voyage, the buyer agrees to take another cargo or cargoes of about equal quantity. It was held that this was a contract for five hundred tons, more or less, and not of a quantity limited by the capacity of the vessel. Also that it was not a warranty that the "John Phillips" should be of a capacity to carry five hundred tons.

Jervis, C. J., said he thought *the true construction of the contract to be that the plaintiff was to have five*

hundred tons, and that the quantity was not limited by the capacity of the "John Phillips". The "John Phillips" completed the voyage, but carried considerably less than five hundred tons, not having capacity for that quantity. Jervis, C. J., said:

> "The parties evidently contemplated that that vessel was capable of carrying 'about five hundred tons'."

But as it turned out she could not carry five hundred tons, he was of the opinion that the buyers were entitled to judgment for the difference. This was also the opinion of Maule, J. He said:

> "In truth, it is just the same as if all about the 'John Phillips' were struck out of the contract. It is not said what shall happen if the 'John Phillips' should be incapable of carrying the whole quantity stipulated for."

It was his opinion that the sellers should be excused from performance by the "John Phillips" if the "John Phillips" could not carry the entire cargo. In his opinion the "John Phillips" was mentioned because both parties believed the "John Phillips" capable of carrying about five hundred tons of the commodity in question. He held that it was "an absolute contract for the delivery of a certain quantity of merchandise which the defendant might have delivered, and for the non-delivery of which he has no excuse".

Cresswell, J., was of the opinion that:

> "The contract is for the sale of 'about 500 tons of nitrate of soda'; and *we may infer that the intention of the parties was that the 'John Phillips' should be employed* to bring it home, and that the

> buyer should have the full benefit of that ship for that purpose. *There was, however, no warranty that the whole should come by the 'John Phillips'.* It was agreed that the 'John Phillips' should be fully laden with it; but there is no absolute engagement that she should be able to carry or should carry the whole 500 tons."

Crowder, J., was of the same opinion, and noted the contention that the word "about" was inserted with reference to the subsequent stipulation that "the above nitrate of soda" was to form the full and complete cargo of the "John Phillips". He was of opinion, however, that the word "about" was equivalent to "more or less", and he said:

> "Though the parties seem evidently to have contemplated that the 'John Phillips' would be able to bring home the whole quantity stipulated for, there is no actual engagement on the one side to buy and on the other to sell only so much as she would contain."

In *Springfield Seed Co. v. Walt,* 67 S. W. 938, the court said:

> "The mutuality of covenants turns on the intimacy of their connection considered in the light of the entire agreement,—whether one was so bound up with the other that the failure of one party to perform a stipulation hindered performance by the other party, or left him without an adequate consideration for performance. A wholesome, rule, and the most practical one for determining whether covenants are mutual or independent, was once well stated by Lord Ellenborough as follows: 'When the mutual covenants go to the whole of the consideration, they are mutual conditions, the one precedent to the other; but when the covenants go only to a part, then a remedy lies on the covenant to

> recover damages for the breach of it, but it is not a condition precedent.' Ritchie v. Atkinson, 10 East 306; Leake, Cont., 650."

In the case of *Ellsworth v. Knowles,* 8 Cal. App. 630, 633, a contract for the purchase of apricots contained the clause, "Buyer to furnish lace paper with usual allowance for same." The defendant failed to deliver the apricots, and set up as one ground of defense that the plaintiff, the buyer, had failed to furnish lace paper. It was shown that the provision in question was a provision inuring to the benefit of the buyer, and the court said:

> "Appellants also urge that plaintiff never supplied the lace paper, and that this was an act that he was required to do before defendants could pack or deliver the apricots. But it was clearly shown that the provision 'Buyer to furnish lace paper with usual allowance for same' was a provision for his benefit. One of the defendants so testified. While defendants were still trying to obtain the apricots to fill the contract, and before they finally abandoned their efforts to carry out the contract, plaintiff notified them that they could use their own lace paper. He thus waived a provision of the contract intended for his benefit. A party to a contract may waive a provision intended for his benefit."

In *Diepenbrock v. Luiz,* 159 Cal. 716, a lease contained the provision that the lessor might sell the demised premises at any time during the said term, and that whenever sold "this lease shall cease and be at an end". The premises having been sold, the lessee contended that the lease was terminated the instant a bona fide sale was effected by the lessor. Judge Shaw (page 722) said:

> "The provision for the termination of the lease upon a sale of the premises was solely for the benefit of the lessor. He could undoubtedly waive the benefit thereof and, without terminating the lease, he could sell and convey the premises subject to the lease."

It is pointed out in *Redpath v. Evening Express Co.*, 4 Cal. App. 361, 367, that it is not the breach of any term of a contract that entitles the other party to refuse performance. It is only where the obligation broken by the plaintiff is a condition precedent to the defendant's obligation that the breach is a defense. It was said in the case last cited that the failure to perform an obligation where "it is only partial and either entirely immaterial or capable of being fully compensated," has always been regarded as insufficient to constitute a defense (page 368).

An obligation in a contract is not regarded as a condition precedent unless made so by the express terms of the contract, or by necessary implication.

1 Chitty's Pleading, 321, 322;
Anson on Contracts, 287, 303, et seq., 308, et seq., 376, et seq.

Conditions precedent are not favored in the law, and stipulations in a contract will not be construed to be conditions precedent unless clearly required by the terms of the contract.

Antonelle v. Lumber Co., 140 Cal. 309, 315.

It is clear therefore that it is not every stipulation in a contract the breach of which excuses the other party from performance. The presence of the "Marston" at

the mill wharf, where delivery was to be made, added nothing to the ascertainment of either the time or place of delivery, or the quantity or quality of the lumber to be delivered. Since the delivery was free on board mill wharf, or free on board barges, the further disposition of the lumber in no way entered into the seller's obligations under the contract. The acts to be performed by the seller were precisely the same whether the lumber was loaded onto the "Marston" or not. Its obligation to perform could not, therefore, be affected by the presence of the "Marston" at the wharf. The provisions for demurrage and for a certificate were obviously provisions for the benefit of the buyer, which the buyer could waive. They were certainly no part of the consideration moving to the seller.

We submit that the case here falls within the reasoning of the Justices in *Reade v. Meniaeff, supra.* To paraphrase the language of that decision, the loading of the "Marston," "being the probable state of things they (plaintiffs) contemplated (but did not stipulate for), they in terms provided for (but are not bound to) that mode of performance." We quote the language of Cresswell, J., in that case:

> "We may infer, that, at the time of entering into the contracts, the parties *contemplated* that one ship (and here we may say the 'Marston') should receive each lot; *but not that the plaintiffs contracted, as a condition precedent,* that this should be done."

There is nothing in the contracts in this case which can be said to bind the plaintiffs to the use of the "Marston" in taking delivery of the lumber. That they

expected to use her for that purpose is obvious, but there is no provision which makes her use a condition precedent to delivery.

In *Harrison v. Fortlage,* 161 U. S. 57, the contract was for a shipment from the Philippines per steamer "Empress of India," at five and five-eighths cents per pound ex ship. The cargo was loaded on the "Empress of India", but was subsequently transshipped. It was claimed that shipment and delivery would have to be made by the "Empress of India." The Supreme Court of the United States held otherwise, and came to the conclusion that the contract did not require that the sugar should arrive by the "Empress of India," differentiating the case in this respect from those cases where the contract was for the sale of goods to "arrive by" or "on the arrival" of a named ship. The court said:

> "A particular ship being designated as to the putting on board only, and not as to the arrival, it is not to be inferred that the goods must be carried to their destination in the same ship."

To the contention that the provision for five and five-eighths cents per pound ex ship required a delivery from the "Empress of India," the court replied:

> "The words 'ex ship' are not restricted to any particular ship; and by the usage of merchants, as shown in this case, simply denote that the property in the goods shall pass to the buyer upon their leaving the ship's tackle, and that he shall be liable for all subsequent charges of landing. They do not constitute a condition of the contract, but are inserted for the benefit of the seller. See *Neill v. Whitworth,* 18 C. B. (N. S.) 435, and L. R. 1 C. P. 684."

It is, therefore, respectfully submitted that the mention of the "Marston" in the contract was a stipulation at best for the benefit of the buyer, which the buyer could waive; that it was not a stipulation affecting the performance of the contract by the seller or the consideration moving to the seller, nor a stipulation which tended to fix either the time or place of delivery, or the quality or quantity of the lumber to be delivered; that, therefore, it was not a condition precedent, upon the failure of which the seller could refuse to perform the contract. If that be so, the failure of plaintiffs to allege or prove that the "Marston" was alongside the wharf upon which delivery was to be made, or alongside barges upon which delivery was to be made, is immaterial to plaintiffs' cause of action.

ARGUMENT OF PLAINTIFF IN ERROR

The nine contentions of the plaintiff in error all revolve about the same question, to wit: Was it essential to plaintiffs' right to the delivery of the lumber in question that at the time of delivery the schooner "Marston" should be alongside the wharf or the barges on which defendant was required to place the lumber?

I.

THE FIRST CONTENTION OF PLAINTIFF IN ERROR (Brief pp. 9-24).

The argument of plaintiff in error under this contention seems to be threefold, it being its position (a)

that Judge Van Fleet erred in overruling the demurrer to the complaint; (b) that Judge Bean erred in following this ruling because Judge Van Fleet had later reversed himself in overruling the demurrer to the answer, and (c) that there was error of some kind in connection with the consideration of the contract between plaintiffs and The Charles Nelson Company.

(a) The first of these positions, relating to the sufficiency of the complaint, has been fully considered above. Plaintiffs in error now cite no authorities in support of their suggestion that the demurrer to the complaint should have been sustained.

(b) The argument, based upon the fact that Judge Van Fleet overruled a demurrer to the answer, is supported by no authorities or discussion of the law, but is based simply on the theory that Judge Bean was bound to follow the latest ruling of Judge Van Fleet, irrespective of the legal soundness of his rulings. Obviously such an argument is entitled to no consideration in this court, where the issue is simply whether or not the judgment of Judge Bean is right or wrong. Even if Judge Van Fleet's ruling on the demurrer to the answer was inconsistent with Judge Bean's judgment, if Judge Bean's judgment is right it must be affirmed.

But the decision of Judge Van Fleet on the demurrer to the answer is in no way inconsistent either with his original ruling on the demurrer to the complaint or with the judgment given by Judge Bean. While the plaintiff's demurrer to nine pages of the answer was sustained, the first eleven pages stated matter which would

constitute matter of defense, if defendant could prove it. We refer to the matter of trade terms as pleaded by defendant and to customs set up by defendant. This is why the demurrer to the answer was overruled. The evidence as to the meaning of the trade terms did not support defendant's contentions and the alleged customs were abandoned by defendant as an aid to their defense. Indeed the eleventh finding of the trial court is that there was no material or competent evidence offered or given on the trial showing any custom which is sufficient to vary in any way the written agreement or contract between the parties as alleged in the pleadings (Record p. 57). Thus the matter which Judge Van Fleet, in overruling the demurrer to the answer, held might be shown in answer to the complaint, failed as a defense and the ruling that it might be proven has no further significance.

(c) The present position of plaintiff in error in regard to the Charles Nelson contract is by no means clear. The brief does not comply with subdivision b, of Sec. 2, of Rule 24 of this court, requiring "a specification of the errors relied upon which in cases brought up by writ of error shall set out *separately and particularly* each error asserted and intended to be urged. * * * When the error alleged is to the admission or to the rejection of evidence the specification shall quote the full substance of the evidence admitted or rejected." The only exceptions saved by plaintiff in error in this connection (Record pp. 69-70) relate to certain preliminary oral testimony given by Mr. Comyn. These exceptions are made the basis of assignment of

error No. XI (Record p. 323). This assignment of error is not mentioned in the brief in any way and has apparently been abandoned. In respect to the admission of the instruments themselves, there is no assignment of error.

We submit, however, that it could not have been error for the court to permit testimony as to the meaning of the phrase "sold prior to October 11, 1916," in the instrument dated November 2, 1916 (Brief of plaintiff in error, pp. 17 to 23). As the court correctly said it was "entitled to all the facts surrounding the case, if I have to interpret this contract" (Record p. 71), and as the court noted, the memorandum of November 2, 1916, says, "This will confirm sale to you of four cargoes" (Record p. 73). The defendant took over the contract of October 11, 1916 (Record pp. 74 to 75) and the whole matter constitutes one transaction.

Mr. Baxter, the manager of the defendant, had drawn the contract, which was made "prior to October 11, 1916" (Record p. 221). He had been the manager of The Charles Nelson Company.

> "They were owners of two large mills, and these two large mills, it was known, were going into this combine, and I was slated to be manager of the combine," referring to the defendant. (Record p. 221.)
>
> "Mr. Comyn came to me about these four cargoes. I told him we would take care of them. He said he had committed himself, or had sold them at a $10 base." (Record ib.)

Later the witness testified that he

> "told Mr. Comyn that we had taken all the others on at $9.50, and I did not think it would be fair to

> take his at $10, and for that reason we canceled that entirely and substituted the new contract at $9.50. * * * Really the Douglas Fir Company took over the obligation of The Charles Nelson Company with respect to those four cargoes, and put them in at a price of $9.50 instead of $10, half a dollar lower than the original price at which the contract was made, so as to put Mr. Comyn on the same basis with all the others." (Record p. 222.)

Moreover and quite apart from these matters, without reference to the previous correspondence, we submit that the interpretation of the instruments dated November 2, 1916, and December 15, 1916, remains the same (*supra*).

II.

PLAINTIFF IN ERROR'S SECOND CONTENTION (Brief pp. 24-32).

We pass the argument (Brief of plaintiff in error pp. 24-32) concerning the Federal Trade Commission and defendant's relations to it, as forming no material factor in this contract. There was no evidence on the subject. Neither can we understand how or why defendant's relations with the Federal Trade Commission or the purposes of its charter or the legality or illegality of its practices could bind the plaintiffs.

The various matters specified at pages 27 to 29 of plaintiff in error's brief as being excluded from consideration under the trial court's decision will be found on analysis to have no bearing on the issue. F. a. s. mill wharf means "free alongside wharf" (Record

pp. 117, 137, etc.). As the testimony shows the price covered delivery on the mill wharf; the buyer had to take the lumber off the wharf. Inspection certificate and tally would be the same whether the delivery would be to barges or on the wharf and whether a sailing vessel or a steamer were alongside or not. (Record pp. 88, 89, 90, 92.) As a matter of fact inspection and tally under the contract would be made on the mill wharf and would be the same, unaffected by the presence or absence there of a carrier vessel. (Record pp. 77, 106-7.)

Plaintiff in error (Brief p 30) cites:

National Pub. Co. v. International Paper Co., 269 Fed. 903, 905.

We submit the case is not in point. There there was a contract by which defendant agreed to furnish plaintiff with "the entire supply of half-tone newspaper required to print rotogravure supplements * * * during the period of one year, * * * estimated at 400 tons, to be ordered and delivered in installments of approximately ..... tons per month." Plaintiff was, at the time the contract was made, engaged in the business of printing newspaper supplements, and, although not then using rotogravure, was intending to install a rotogravure press, as it did soon after.

Judge Hough held this to be a "requirement contract", under which plaintiff was not entitled to demand, nor defendant obligated to supply, 400 tons, without regard to plaintiff's requirements during the year for rotogravure work. * * *

There was a dissent by Judge Ward, who construed the contract to be for 400 tons.

The case is obviously not parallel to this case, which fixes a quantity variable within a specified limit of 15% to suit the buyer's convenience.

The only other matter discussed in this portion of plaintiff in error's brief requiring notice is the argument that because plaintiffs requested and were refused the privilege of substituting other vessels than those named that therefore they had no such right (Brief of plaintiff in error, p. 26; see also p. 48). But if the naming of the vessels in Mr. Baxter's sale note of November 2, 1916, did not constitute a material covenant, and make the presence of the vessels a condition precedent to performance, the correspondence requesting the right, and the refusal of the right to substitute, could not make it material, or such a condition. Nothing indicates that the parties intended to modify the contract by this correspondence, or that they did so; as an interpretation of the contract, the letters cannot fix the parties' rights. That is a matter for the court. The assumption that the defendant would not object, did not mean that plaintiffs had not the plain right referred to even if defendant did object. Had defendant wished to commit plaintiffs to the position now taken, defendant should have asked plaintiffs for a confirmation of that position.

Furthermore the court is not called upon to consider plaintiffs' right to substitute another vessel, but merely

plaintiffs' right to delivery on the mill wharf or on barges, as called for in the contract, though the "Marston" might not be alongside at the time of delivery.

III.

PLAINTIFF IN ERROR'S THIRD CONTENTION
(Plaintiff in Error's Brief pp. 32-46).

The reference to our previous position in this case at page 32 of brief of plaintiff in error is disingenuous. As already stated, we took the ground, which we still maintain, that a delivery f.o.b. a vessel is different from a delivery on a mill wharf or on barges f.a.s. a vessel. This does not mean that a provision for delivery f.o.b. a vessel may not, under the terms of the contract, be a price term as in this case (see Record p. 89, 142-144), inserted wholly for the benefit of the buyer, and one which he may waive (*Meyer v. Sullivan, supra,* and cases cited). In any event, in this case the contract was not for delivery f.o.b. the "Marston", and it seems unnecessary to further dwell on the attenuated comfort which defendant derives from our discussion of cases involving f.o.b. vessel deliveries at previous stages of this litigation. We proceed rather to a discussion of the authorities which they cite to support their argument.

McCandlish v. Newman, 22 Pa. St. 460, the first case cited by defendant on the subject of f.o.b. and f.a.s. contracts (Brief p. 32) must be considered in the light of the proposition that a provision for delivery at some

point f.a.s. vessel is, so far as the vessel is concerned, a delivery for the benefit of the buyer and not of the seller.

Our contention in this case is that the stipulations in respect to the "Marston" were for the buyers' benefit, and the case of *McCandlish v. Newman* lends point to our argument. It appears in that case that long before the buyer had his vessel ready to receive the lumber to be delivered, the lumber was placed on the wharf where it was destroyed. The court held that while on the wharf and before the buyer had his vessel alongside, the lumber was the property of the seller and at his risk. In other words, the court held that an agreement to deliver on a wharf alongside a vessel entitles the buyer not only to delivery on the wharf, but at a time when he can bring his vessel alongside. The case in no respect challenges our position that if the buyer chooses he may take the lumber off the wharf before the vessel is alongside the wharf, or our argument that the stipulations with reference to the vessel in such cases, are for the buyer's benefit. On the contrary, the case supports that position.

The case of *Wackerbarth v. Masson,* III Campbell 270 (Brief p. 33), relied upon by the defendant, recites a contract as follows:

"London, 17 Jan. 1812.

Mr. Wm. Masson,
Bot of Mr. J. H. Wackerbarth,
95 Hds. Dble. Loaves, at 78/ Free on board a foreign ship—Prompt 2 months—a bill at 2 months with interest."

The defendant demanded of the plaintiff that the sugars be transferred into his name in the warehouse-keeper's books. The plaintiff refused to do so, but offered to put the sugars on board any ship the defendant should name. The defendant still insisted upon an order for delivery of the sugars, and, being unable to procure it, intimated to the plaintiff that he entirely renounced the contract. The report of the case states:

> "It appeared that when sugars are sold for exportation in this manner, the seller is entitled to a bounty, which he receives when they are bonded."

This bounty the seller would have lost by delivery to a warehouse, thus effecting a material change in the contract.

But an essential point of difference in this case, as in *Armitage v. Insole* (Brief of plaintiff in error, p. 35) and in *Dwight v. Eckert* (ib. p. 36) and in *Walton v. Black* (ib. p. 36) is that the undertaking was, in every instance, for delivery *free on board* the buyer's vessel.

The case of *McFarland v. Savannah River Sales Co.*, 247 Fed. 652 (Brief p. 37), is entirely different from the case at bar.

In the McFarland case the buyer did not have his barge or vessel ready to remove the lumber, and contended that the seller would nevertheless be obligated to pile the lumber on the wharf, "there to remain until taken away at the convenience of the defendant", i. e., the buyer. In the case at bar the buyers provided facilities to take delivery and remove the lumber within

the time and at the place fixed in the contract. They offered and were ready to take delivery "on barges" or "f.o.b. mill wharf Knappton". The complaint shows that the seller refused to make delivery in either manner.

The McFarland case is authority for the position that it was the duty of the buyers here to take delivery whether the vessel in which the buyers expected to make the shipment was available or not. In the McFarland case the court points out that the buyer bound himself to take delivery to complete the transaction within a specified time, and says:

> "He was bound, therefore, to supply barges and vessels within that time. * * * Failing to get the barges he had chartered, he was bound to go elsewhere and obtain other barges, if available, with which to carry out his part of the contract."

The whole basis of the decision in the McFarland case is contained in the view expressed by the court that the contract necessarily contemplated an implied covenant upon the part of the vendee that when the vendor had placed the lumber at the location at which he had agreed to place it, the vendee would remove it; and that, therefore, the furnishing of some vehicle by the vendee for the removal of the lumber was a condition precedent to performance by the vendor. In the case at bar, if we assume such an implied covenant as a condition precedent to performance by the vendor, the vendee, in the first place, performed this condition precedent by undertaking to furnish the barges within the time required by the contract, and the vendor, in

the second place, relieved the vendee of the covenant in question by notifying the vendee of its refusal to cut or deliver the lumber.

In the McFarland case the buyer claimed the right to remove the lumber from seller's wharf after the time fixed in the contract, because the place of delivery was to be "f.a.s. barge or vessel", and claimed that such delivery could be made whether there was a barge or vessel there or not. But, as the court held, the buyer was under an implied obligation to remove the lumber from the wharf as it was delivered. In the McFarland case the buyer was not ready to do so. In the McFarland case, therefore, the presence of the barges was material to the vendor.

In the case at bar, again, the plaintiffs would have been ready to receive the lumber on barges or remove it from the wharf by barges as and when delivered, but defendant refused to recognize their right to do so, and indeed refused to instruct the mill to cut the lumber (Record p. 109). On the theory of the McFarland case, therefore, the presence or absence of the "Marston", or of any ship, however material it might be to the plaintiffs, was immaterial to the defendant, or to the performance of the contract between the parties, since it would not affect the delivery or removal of the lumber.

In the case of *Maine Spinning Co. v. Sutcliffe & Co.* (Brief of plaintiff in error p. 38), the court decided, first, that under the correspondence and facts accompanying the execution of the agreement in that case,

a contract for "delivery Liverpool" meant delivery on board a vessel at Liverpool; and, second, that as the buyer had failed to provide a vessel, the seller was not obligated to some other method of delivery, such as on rail or in warehouse.

The case is precisely like the other cases cited by defendant, to the effect that where a delivery is stipulated to be made f. o. b. a vessel, and the stipulation is a condition precedent to performance, so that without the presence of the vessel performance cannot be had, the vessel must be furnished. The cases do not militate against our contention in this case, but, on the contrary, emphasize our contention.

The court in *Maine Spinning Co. v. Sutcliffe & Co.* pointed out that a stipulation "for the benefit of one of the parties to the contract may be waived by the party for whose sole benefit it is inserted", but held in that case that "a term of the contract as to *the mode of delivery* is not entirely for the benefit of either party", and cannot be waived by one of the parties.

That is exactly our contention. As we have before urged, the presence or the absence of the "Marston" was wholly immaterial *to the mode of delivery* here contracted for, which was to be either on the mill wharf or on barges. Plaintiffs claim no right to vary the mode of delivery specified by the agreement.

Plaintiff in error also cites the following cases (Brief p. 40):

Nickoll v. Ashton, 2 K. B. (1901) 126.

The material part of the contract is as follows: "Sold this day to Messrs. Nickoll & Knight the following Egyptian cottonseed—namely, a cargo to consist of from 1600 tons to 1900 tons *to be shipped by the steamship Orlando at Alexandria* * * * during the month of January, 1900. * * * The seed to be delivered at destined port to *buyer's craft alongside.* * * * (Signed) Ashton & Co." There was a clause that: "In case of prohibition of export, blockade, or hostilities preventing the shipment the contract or any unfulfilled part thereof is to be cancelled." On the face of the contract the *words "ship or ships" were obliterated,* and the words *"per steamship Orlando"* were inserted in writing in their place.

Smith, M. R., stating that the contract clearly called for shipment during the month of January *in the steamship Orlando,* and in no other ship, *held* that the contract must be construed as subject to an implied condition that, if at the time for its performance the Orlando should, without default on the defendants' part, have ceased to exist as a ship fit for the purpose of shipping the cargo, then the contract should be treated as at an end. *Romer, L. J., concurred.*

Vaughan Williams, L. J., dissented, stating:

"The time of loading is a condition introduced into the contract for the benefit of the buyers. It is a condition which the buyers could waive. * * *"

The case is in line with the authorities which hold that a shipment bought ex a designated vessel is a sale of a shipment to arrive *by that vessel*—a principle

which we need not dispute in this argument, but which is not in harmony with many authorities The sale here was for delivery on the wharf or on barges, not on the "Marston."

Forrestt & Son v. Araymayo, 9 Asp. 134, Eng. Rep. Ann. (1900) 2607:

Plaintiffs agreed to build a launch for defendants, which was to be shipped to South America. The period of completion was to end on January 7th, delay to be charged against plaintiffs at 5 pounds per diem as liquidated damages. *Defendants had agreed to provide a ship to carry the launch.* Defendants, after January 7th, did not offer a ship until April; and plaintiffs did not complete the launch until April. Defendants claimed liquidated damages.

Held: Defendants were under an obligation to provide a ship to take the launch, "and in order to claim the benefit of the clause penalizing delay on the part of the plaintiffs, they had to show their readiness to provide the ship. This they had not done until April. Therefore, since the defendants had not done their part, from the point of view of liquidated damages it did not matter that the plaintiffs had not done theirs." Here the launch was to be delivered to a ship which the buyer agreed to provide. Having failed to provide the place of delivery within the time specified the buyer was held to have forfeited his right to performance.

Whiting v. Gray, 8 So. 726:

The case involved a contract by which lumber was to be delivered on cars alongside of vessel at a specified

wharf, at the rate of not less than 20,000 feet per day, "*commencing from the 10th of July, or as soon thereafter as vessel can be ready.* * * *" The parties had in mind no particular vessel, but understood that the purchaser would have to charter a vessel.

Held: It being admitted that the plaintiff did not charter or procure a vessel within a *reasonable time* after July 10th, the defendant was entitled to judgment in suit against him for failure to deliver the lumber. The case we submit throws no light on the issue here involved. The buyer there undertood to take delivery within a reasonable time and failed to do so.

Blossom v. Shotter, 13 N. Y. Supp. 523:

Plaintiff telegraphed defendants in Savannah for price of rosin "f.o.b. my vessel at Savannah." Defendants telegraphed the price, which plaintiff by telegram accepted. Defendant understood the contract was for immediate delivery, but by subsequent correspondence the contract was changed to provide for delivery to the vessel to arrive "within the next 30 or 40 days." Plaintiff did not furnish vessel until after expiration of forty days.

Held: "It was clearly the intention of the parties * * * that the vessel should be there within the period named, and that was one of the conditions of the contract. And the defendants owed no obligation to the plaintiff except to wait for the expiration of the time, and, after the time expired in which the plaintiff agreed to have his vessel there, they were absolved from completion of the contract."

This case simply decided that *after* the time of delivery had expired the plaintiff could not demand performance. If we had demanded delivery of the lumber after December 31, 1917, the case might have a bearing here. As it is we submit it has none.

None of these cases we submit decide that the buyer is not entitled to delivery at the *place* specified in the contract within the *time* specified. In each of them the buyer's default would have changed the seller's obligation to deliver if performance had been enforced.

IV.

PLAINTIFF IN ERROR'S FOURTH CONTENTION (Brief pp. 46-70).

HEREIN ALSO THE SEVENTH CONTENTION (pp. 81-84).

Defendant makes the point that this was a cargo sale and not a sale of 3,750,000 feet, as expressed in the contract of November 2, 1916. It would be interesting to know just what a cargo sale of two "vessels to be named later" might be (see contract, Plaintiffs' Exhibit 1, Record p. 68; complaint, Record p. 3).

Without reference to the original contract between The Charles Nelson Co. and plaintiffs, which was for "3500M of Oregon ten per cent. more or less"' (Plaintiffs' Exhibit 2, Record pp. 24-5), it is quite clear that the contract of November 2, 1916, and the four acknowledgments of order which followed it were for specific quantities, fifteen per cent, more or less to suit capacity of vessel.

Plaintiffs' letter of November 6, 1916, addressed to defendant, reads:

> "We have to acknowledge receipt of your sale note covering *3500M 15% more or less October to December, 1917.* We now take pleasure in approving same as per enclosed" (Defendant's Exhibit "F," Record p. 157).

If defendant's contention is correct, there was no purpose in specifying any quantity; the mere specification of the vessel would govern the subject matter of the sale; all the figures in the various contracts would be surplusage; and as to the "two vessels to be named", the contract would be wholly uncertain and indefinite. The fact is as the witness Comyn testified that plaintiffs purchased "one parcel of lumber" (Record p. 149).

Some argument is made on the fact that plaintiffs furnished specifications, pro forma bills of lading, etc., all to be used in loading the lumber onto to the "Marston." From this defendant argues that as late as September 19, 1917, plaintiffs "were still of the belief that the sale was of a cargo for the schooner 'Marston' and nothing else" (Brief p. 50). There is no question that plaintiffs desired this lumber for export purposes. It may be admitted that they wanted to load it on the "Marston." In fact they loaded the "Marston" with the lumber which they bought when defendant failed to deliver. But how does that answer the point that plaintiffs were entitled to the lumber on the mill wharf or on barges if the "Marston" was not yet there?

So the specifications would be the same, whether the lumber was loaded on a barge or on a sailing vessel. As the witness Comyn testified:

> "There would not be a bit of difference in the specifications if the lumber was loaded on to a barge or on to a sailing vessel, the specifications would be just the same that you gave the mill to cut" (Record p. 89).

The witness Comyn also testified:

> "'Mill tally and inspection to govern and be final' means inspection to be made at the mill wharf before the lumber was taken from the wharf. There would be no difference at all in the inspection if the lumber was loaded on to a steamer or if it was loaded on to a sailing vessel. There would be no difference at all in the inspection if the lumber was loaded on to a barge and not on to a sailing vessel." (Record p. 88.)
>
> "The buyer puts it on the ship, and the seller's obligation is complete when he puts the lumber on the mill wharf. He must not leave it outside of the mill wharf, he has got to bring it to the face of the wharf so that you can get it and put it anywhere you want to. The buyer is responsible for the taking of the cargo off of the mill wharf. If a steamer is alongside the mill wharf, what I have just stated is absolutely true because you pay the steamer a certain rate which provides that she shall put her tackle over and put that stuff over on board. If you put a steamer alongside, the buyer takes the lumber off the wharf and puts it on the steamer. The seller has nothing to do with that operation. If you put a sailing vessel alongside the wharf, the fact is absolutely the same. With regard to putting the lumber on a sailing vessel, when you charter a ship you pay that ship a certain rate for chartering. The buyer puts the lumber on the sailing vessel. All that

> the seller has to do with it is to deliver it on the face of the mill wharf so that the ship can get at it. He does not have to put it on the sailing vessel. If you put barges alongside the wharf, the buyer puts the lumber on the barges. The seller has nothing to do with that. The seller's obligations in respect to the delivery of the lumber are the same whether it be a steamer, a sailing vessel, or a barge, where he buys the stuff 'f.a.s. mill wharf.'" (Record pp. 78-79.)

We suggest that defendant's position that this was a cargo sale is an unsound reply to the proposition that as the contract called for certain quantities to be delivered at certain places, the absence or presence of the vessels could affect neither the obligations nor the rights of the seller. Defendant argues that the vessels were the necessary measure of the quantity to be delivered, and subordinates its argument that their presence was necessary for delivery. Yet when the contract was made two of the vessels were not even known. The fact is that the "Marston's" capacity would measure the quantity deliverable within the limits of fifteen per cent. more or less than 1,300,000 feet; similarly the "Talbot"; similarly the two other vessels "to be named later". The contract fixed the quantity without reference to the ships, but allowed the buyer to vary it by fifteen per cent. to suit their capacity.

The testimony that the exact quantity which a ship will take cannot be determined until the ship is loaded is beside the point. Plaintiffs' letter of September 21, 1917 (Record p. 94) exactly states the fact; the contract was originally "for specific quantities."

What would happen if a vessel tendered exceeded in capacity the quantity named plus fifteen per cent. is well settled by the record.

Thus the two vessels which were originally not named, but later designated under this contract, were the "Bowden" and the "Golden Shore". The "Golden Shore" was first named. When the "Bowden" was named it developed that her capacity, combined with that of the "Golden Shore", exceeded 1450M plus 15%, the quantity specified in the contract. Thereupon defendant notified plaintiffs that the excess was not deliverable under the contract. Defendant wrote plaintiffs:

> "San Francisco, August 17, 1917.
>
> Messrs. Comyn, Mackall & Co.,
> 310 California Street, San Francisco.
>
> 'William Bowden'.
>
> Gentlemen:
>
> We acknowledge your favor of the 16th inst., with specification for this cargo, and accept the vessel conditioned on her making the loading date provided in the contract, and with the further understanding that as the original contract, dated November 2, 1916, provides for two vessels to be named with a joint capacity of 1450M, which is interpreted to mean, as usual, 1450M, 15 per cent more or less, and as you have already named the 'Goldenshore' for one cargo and now name the 'Bowden' for a second cargo, which vessels combined will probably carry more than the maximum amount of the contract, that you will pay us for all such excess carried by these two vessels over and above the 1450M plus 15 per cent, at the present market price, namely, $20 base 'G' list, less 2½% and 2½% for cash.
>
> Please send us the charter party, in duplicate, for the 'William Bowden'.

Written in duplicate—please approve and return one copy for our files.

Very truly yours,

Douglas Fir Exploitation & Export Co.,
By A. A. Baxter, General Manager."

AAB-L

"Approved:"

(Plaintiffs' Exhibit 24, Record p. 172.)

This is a conclusive answer to defendant's contention that the contract was for four cargoes for four specific vessels, regardless of the quantities named in the contract, if indeed the contract does not on its face contain the answer.

Neither do the circumstances relative to the loading of the "Marston" in Australia and her return with cargo instead of in ballast change these conclusions. Early in September, 1917, or sooner, it became apparent that the "Marston" could not reach the Pacific Coast by December 31, 1917. The plaintiffs were anxious to load the "Marston". They offered $2500 for an extension of her loading date (Record p. 293). With or without cargo she could not get to her loading port by December 31st. The defendant refused to extend her loading date. Therefore, plaintiffs, acting no doubt on the advice which defendant infers to have been given (Brief of plaintiff in error, p. 55), permitted her to be loaded instead of coming back in ballast. For this they received a consideration. But as the vessel could not in any event make her loading date, a further delay (Mr. Comyn said there would be none, since she would sail faster with cargo, Record p. 104) could not affect plaintiffs' position. But no significance

can be attached to the offer to defendant of $2500 for an extension of the loading date, other than the desire of plaintiffs to put the lumber on the "Marston"; they obviously preferred that course to the expense of taking it on barges, with the consequent necessity for storage and double handling.

The witnesses do not support the position that these were cargo sales, and that the figures named had no contractual effect. Defendant quotes Mr. Comyn and Mr. Baxter. Then analysis of Mr. Comyn's testimony does not bear out counsel's view. Mr. Comyn merely testified to what is obviously true, that if a contract is "for a cargo by the vessel" it is a cargo contract. He nowhere said that a quantity contract "fifteen per cent. more or less to suit capacity of vessel" is a contract for the vessel's cargo regardless of quantity.

Mr. Baxter, it is true, so testified. He is impeached by every other witness on the subject, by his own letter and, we submit by the dictates of common sense. According to him the quantities stated could have been "omitted" (Record p. 271), Yet when we come to his letter concerning the "Bowden" (Plaintiffs' Exhibit 24, Record p. 172), he says the contract is for 1450M feet, joint capacity of two unnamed vessels, "which is interpreted to mean as usual 1450M 15% more or less"; he calls attention in this letter to the fact that the two unnamed vessels will exceed in joint capacity 1450M feet, and he demands "that you will pay us for all such excess carried by these two vessels over and above the 1450M plus 15% at the present market price, namely, $20," etc., etc. (Record p. 173).

In one and the same breath this witness says the figures mean no more than if they had been "omitted", and that any excess above the figures named must be paid for at market price, or double the contract price. The positions are wholly inconsistent.

Finally the contention that in these contracts the quantities named are mere surplusage, and that the buyer, regardless of the stated limits, takes whatever the vessel will carry, is rejected by three of the defendant's own witnesses, Blair (Record p. 245), Griggs (Record p. 194), Ames (Record p. 207), and by our own witnesses, Dollar (Record p. 279), etc., etc.

All the plaintiffs' witnesses and all the defendant's witnesses who testified upon the subject, excepting only Mr. Baxter, testified that the capacity of the vessel forms the quantity sold *only* within the limits of the figures of the contract (Blair, Record p. 246; Dollar, Record p. 283; Dant, Record p. 135; Comyn, Record p. 173; Griggs, Record p. 193; Ames, Record p. 208; Tyson, Record p. 287). To illustrate, Mr. Tyson, on cross-examination, testified:

> "Where there was a sale of a specified quantity of lumber, 15% more or less to suit the capacity of vessel, if the vessel took more than the specified quantity plus the 15%, the seller was not obliged to deliver that excess up to the capacity of the vessel. If a vessed has a capacity of two million feet, and there is a contract for 1,300,000 feet, 15% more or less, the buyer could not claim the entire two million feet to suit the capacity of the vessel from us. As matter of custom he would be entitled under such a contract to the maximum of his contract. That would be 1350M plus 15 per cent." (Record p. 287.)

Some effort was made on the trial to show that the "Marston" was delayed in reaching her loading port at Astoria, through the agreement of plaintiffs permitting her to return from Australia with wheat instead of in ballast. The plaintiffs chartered the "Marston" in 1916 (Record pp. 261, 262). Her cancellation date—that is, the date at which she had to be at Astoria, or the charter be canceled at plaintiffs' option—was March 1, 1918. On September 19, 1917, plaintiffs sent defendant specifications for her lumber (Plaintiffs' Exhibit 7, Record p. 91). The "Marston" was then ninety-three days out from the Columbia River for Melbourne (Plaintiffs' Exhibit 8, Record p. 93). On September 20, 1917, defendant informed plaintiffs that the "Marston" had very little chance of commencing to load at Astoria in December, and notified plaintiffs that *"as before intimated to you under no conditions* could we commence loading this vessel later than December on the old contract, which provides for $9.50 base G list" (Plaintiffs' Exhibit 8, Record p. 93). Plaintiffs were then advised on September 20, 1917, that the lumber would be refused by defendant (Plaintiffs' Exhibit 8, Record p. 93); on September 27th plaintiffs made formal demand (Plaintiffs' Exhibit 10, Record p. 95); on October 1st it was refused (Plaintiffs' Exhibit 11, Record p. 96). There was then no hope of getting the "Marston" to Astoria in December, 1917, and on October 17, 1917, plaintiffs modified her charter to permit her to return with wheat in lieu of ballast, for which they were paid $5,000 (Plaintiffs' Exhibit 25, Record p. 261). Plaintiffs had

endeavored to get defendant to postpone the loading date of the "Marston," and had offered defendant part of the money which they could get for permitting the "Marston" to return with cargo, for plaintiffs obviously wished to load the "Marston" directly under their favorable contract. But Mr. Baxter was obdurate. If they could not get the "Marston" to Astoria by December, 1917, they could not get their lumber—except at his new price—and that was all there was to it.

Counsel argue as to the necessity for the presence of the "Marston" in order to determine the quantity of lumber deliverable under the contract.

We assume it unnecessary to comment on the testimony quoted by counsel, which is to the effect that the exact quantity that a vessel can carry cannot be determined until the vessel is loaded. It is precisely for that reason that the contract contained the clause "15% more or less to suit capacity of the vessel," a term of patent benefit to the buyer.

In support of the contention that the contract was for a capacity cargo for the "Marston," irrespective of quantity, plaintiff in error cites *Harrison v. Micks, Lambert & Co.* (Brief p. 65) and other precedents. These cases all go to the point that the sale of a definite lot of goods, with an estimate as to the quantity, is the sale of that particular lot, and that the estimate is such and nothing more. With that rule we are in entire accord.

Thus in *Harrison v. Micks, Lambert & Co.,* 14 Aspinall M. L. C. (N. S.) 76, the first case cited by de-

fendant, is typical of this line of authorities. In that case the buyer agreed to purchase, and the seller agreed to sell, *the "remainder"* of the cargo of a vessel, which had been discharged into a warehouse at Hull, which the seller estimated at 5400 quarters. It was expressly stipulated that the buyer should have *the "remainder* of the cargo", and this was confirmed by correspondence between the parties. It turned out that the amount of *the remainder* in question was 5974 quarters. The court sustained the contention that what was sold was *the remainder* of the wheat, regardless of the estimated quantity, and likened the case to those in which the subject matter of the sale is described in its entirety, the quantity being estimated. Thus the court referred to McLay & Co. v. Perry & Co., where the parties were dealing with a *heap* of scrap iron, and where the fact that the estimate of the quantity in the heap was incorrect was held to be quite immaterial.

In the case at bar the subject matter of the contract is 1,300,000 feet, fifteen per cent. more or less to suit capacity of the vessel. The case, therefore, falls within the rule of the decisions of which *Cabot v. Winsor,* 83 Mass. 546, and *Peterson v. Chaix,* 5 Cal. App. 526, are typical.

Levy v. Burke, 2 Times Law Reports, 898, cited by plaintiff in error (Brief p. 65):

The material parts of the contract are: "We have this day bought from you as agents of the Browse Island Guano Company (Limited) of Adelaide, *a cargo* of Browse Island Guano expected to arrive per "Alert"

at Hamburg, about 450 tons at 1/9d. per unit of Tribasic phosphate of lime per ton ex ship "Hamburg".

Lord Esher stated that effect must be given to the word "cargo" without requiring the quantity specified, and where the buyer contracted for a "cargo" and mentioned the quantity (unless something plainly shows the contents to be intended) the governing word was "cargo" and the buyer was bound to take the cargo whatever its quantity might be

This case is readily distinguishable as the parties had in mind a cargo which had already been shipped.

Borrowman v. Drayton, 2 Exchequer Division 15, cited by plaintiff in error (Brief p. 65):

In this case plaintiffs sold to defendant a cargo of from 2500 to 3000 barrels of petroleum, to be shipped from New York. The plaintiffs chartered a vessel on which they placed 3000 barrels of petroleum, to be delivered to the defendant, but as this did not fill the ship, 300 additional barrels were placed on board, for which separate bills of lading were issued. It was held that the plaintiffs could not be compelled to take the 3000 barrels in question because they did not constitute the cargo of the ship. The court said:

> "There are various reasons why a purchaser may wish to buy the whole quantity of goods loaded on board a particular vessel. It enables him to select the port of discharge, to appoint the place in the port at which the discharge is to take place, to be free from the inconvenience of others persons' goods being unloaded at the same time with his own, and from the competition arising from other persons' goods being ready for sale, at the same place, and at the same time, with his."

We submit the foregoing excerpt clearly distinguishes that decision from the instant case. There the buyer, for reasons of his own, purchased a cargo, and he desired the entire cargo. Here the plaintiffs purchased a quantity of lumber, with a fifteen per cent. variation to be controlled by the capacity of the vessels on which they expected to load that lumber. In Borrowman v. Drayton the quantity deliverable was the entire cargo. In this case it was a specific quantity, fifteen per cent. more or less, and if the cargo capacity of the vessels which the buyer expected to use in this case had exceeded the quantity named by more than fifteen per cent., the excess would not have been deliverable to the buyer here, although necessary to make up the cargo (Record pp. 135, 193, 173, 208, 246).

The stipulations in respect to the vessels in this case are, as we have urged, stipulations for the benefit of the buyer, and nothing in the opinion in Borrowman v. Drayton indicates that the court there did not consider the stipulations for the buyer's benefit, or that the buyer could not waive the stipulations. On the contrary, the trend of the opinion is that the buyer in that case could have waived the requirement that the quantity deliverable to him should be the whole cargo.

Pembroke Iron Co. v. Parsons, 5 Gray 589,

cited by plaintiff in error (Brief p. 67), decided that a contract for a cargo to be shipped by a designated bark was complied with, although the quantity carried was less than the estimated quantity.

The court said:

> "The figures at the bottom 'about 300 to 350 tons,' are undoubtedly to be taken as a part of the contract. But taken with the context, they manifestly express an estimate only, and do not control the descriptive clause designating and limiting the subject of the contract. The defendant having delivered a full cargo, has performed his contract."

In

Bowes v. Shand, 2 App. Cas. 455, H. of L.,

cited by plaintiff in error (Brief p. 69), it was held that a contract for 300 tons of rice, to be shipped by a named vessel during the months of March and/or April, 1874, was not complied with, shipment having been made during the month of February. The buyer insisted on his right to the time of delivery as specified, and the decision was that the time of delivery could not be varied by shipment in a different month than that agreed upon. The decision is not at variance with any contention that we make in this case.

V.

PLAINTIFF IN ERROR'S FIFTH CONTENTION (Brief pp. 70-74).

Defendant's next point is that the presence of the "Marston" was necessary to fix the time of delivery.

It seems clear that the obligation of the defendant was to deliver at any time during the months of October, November and December, 1917. The contract so reads. Furthermore, the defendant would have the benefit of notice by way of specifications, which would have to be furnished beforehand. The obligation to

deliver at the rate of 60,000 feet per day would arise on the expiration of reasonable notice, as the specifications require. Nothing in the contract justifies the conclusion that the provision for October-November-December delivery made the time of delivery optional with the defendant within that limit.

A reference to the contemporaneous contract between The Charles Nelson Co. and plaintiffs, upon which the present contract was based, makes it clear that the arrival of one or more of the vessels that were to lift this lumber was not in contemplation by the parties as the element fixing the time of delivery.

VI.

PLAINTIFF IN ERROR'S SIXTH CONTENTION (Brief pp. 74-81).

Defendant's next point is that the presence of the "Marston" was necessary to fix the place of delivery (Brief pp. 74-81).

We submit that the whole argument on this subject is answered by the fact that delivery on the wharf, as called for in the contract, completed defendant's obligations in this respect, whether a ship was alongside the wharf or not. In point of fact, the provision in respect to delivery is a price term, and not otherwise a material covenant or condition in the contract. It so appears in the original agreement between plaintiffs and The Charles Nelson Company (plaintiffs' Exhibit 2, Record p. 71), where it is said:

> "Price $10.00 per thousand base 'G' list less 2½ and 2½ f. a. s. mill."

And it so appears in the acknowledgment of order furnished by defendant for plaintiffs' signature, where it is said:

> "Notes. This price is for delivery f. o. b. mill wharf Knappton within reach of vessel's tackles and/or on barges a. s. t. mill wharf Knappton, Wash." (Plaintiffs' Exhibit 4, Record p. 82.)

Under contracts providing for a delivery "f. o. b. vessel" it is sometimes necessary that the vessel be tendered. But even under defendant's construction of this contract it was not incumbent on plaintiffs to *tender* the "Marston". The most defendant claims is that the "Marston" should have been at the wharf and that plaintiffs should take from the wharf the delivery which defendant should have had there completed. But the fact remains that under the authority of *Meyer v. Sullivan,* and the cases therein cited, even the naming of the "Marston" as the point of delivery would not have excused defendant from performance, the "Marston" not being present. In other words, the instant case is very much stronger in support of our contention than *Meyer v. Sullivan,* and the cases therein relied upon. For in this case the mill wharf is designated as the place of delivery, and the mill wharf, of course, was there. All of the provisions about ship's tackles, etc., etc., were clearly terms for the benefit of the buyers; terms which, under the decisions cited by us (*supra*), might be waived by the buyer, and are not available to defendant in seeking to evade its obligation. In making

its delivery to the mill wharf it could make no difference to the defendant whether the "Marston" lay alongside or not.

As the witness Comyn testified:

> "With respect to the place of delivery, the point where the mill had to put the lumber, there would not be a particle of difference whether there was a vessel alongside the mill wharf or a barge. The mill would put the lumber on the same spot on the wharf, whether it was for delivery to a vessel or to a barge." (Record p. 89.)

The witness further testified:

> "When the memorandum says, 'This price is for delivery f. o. b. mill wharf,' it means the price covers delivering that lumber on the mill wharf instead of back away inside the mill. In other words, the delivery was to be on the mill wharf. 'f. o. b.' means free on board the mill wharf. It differentiates between the mill wharf and the interior of the mill, and that price covered delivery on the mill wharf." (Record p. 89.)

VII.

PLAINTIFF IN ERROR'S EIGHTH CONTENTION (Brief pp. 85-90).

Plaintiff in error enumerates certain "benefits" under the contracts which it claims to have based on the presence of the "Marston".

First: That the cargo sold would be exported. We see nothing in the contract about that, but in any event the record shows that the specifications were for export lumber, which could be sold only in Australia (Record p. 302), and, as Mr. Baxter wrote to the Knappton mill,

the specifications furnished by plaintiffs were excellent export specifications. See plaintiffs' exhibit 22 (Record p. 110); see also the testimony of the witness Dant (Record p. 123).

Second: That the presence of the "Marston" gave the means of ascertaining the time at which delivery would be required. We have already considered this point under plaintiff in error's fifth contention and noted that specifications would have to be furnished. Reasonable notice would thus be given of the time when delivery would be demanded. The record also shows that at best the period of delivery is a guess, when this is fixed with reference to the arrival of a sailing vessel more than a year forward (Record pp. 103, 118, 235). The contract as originally made with The Charles Nelson Co. specified a six months' period for delivery, with no reference to any vessel. In the subsequent contract, drawn by Mr. Baxter, the period of delivery was fixed from October to December, 1917, and within those dates, we submit, defendant was bound to deliver.

Third: That the naming of the "Marston" gave some idea as to the quantity of lumber to be cut. This has been fully discussed. The quantity was 1,300,000 feet 15 per cent, more or less. Defendant says that it would have had some idea, derived from the record of the "Marston's" previous loadings, of how much lumber the mill would have to cut. The specifications actually furnished, and which the defendant ignored, were for the "Marston". (Record p. 304). As the record shows, these specifications were cut by Mr. Dant's mill and filled the

vessel, requiring for that purpose within one per cent. of 1,300,000 feet (Record p. 304).

Fourth: That the naming of the "Marston" was an assurance against speculation on the part of the buyer. Here the assumption seems to be that the speculative rights under this contract rested wholly with the seller.

It is undisputed in the testimony that the arrival of a sailing vessel within a period of three months cannot be projected a year in advance (Record pp. 118, 235, 103). The arrival of the "Marston" between October and December, 1917, was, therefore, entirely problematical at the time the contract was made (October-November, 1916). If the vessel failed to arrive, defendant, under its position, could at its option force the plaintiffs to pay damages for not taking the lumber on the "Marston", or defendant could refuse to deliver the lumber. It is obvious what would have happened if the market, instead of going up, had gone down. On defendant's position, therefore, the contract had speculative rights, but these belonged wholly to the defendant.

Nothing in the contract indicates that the parties intended to confer upon the seller any such privilege. On the other hand, the sale of a given quantity, fifteen per cent. more or less to suit capacity of buyer's vessel, is obviously a sale of that quantity, with the right of the buyer to increase or decrease it according to his legitimate requirements in loading the vessel. It is our contention that such a clause is wholly for his benefit. If he chooses to waive the benefit, he must take the quantity specified without the margin allowed him. We

do not contend that plaintiffs were entitled to 1,300,000 feet, fifteen per cent. more if the market went up, and fifteen per cent. less if the market went down. We do contend that if they put the "Marston" alongside the mill wharf, they were entitled to 1,300,000 feet, with fifteen per cent. more or less as might be necessary to load the "Marston". To load the "Marston" was their privilege. The variation from 1,300,000 feet within the range of fifteen per cent. more or less was granted them under the contract only in connection with that loading privilege.

Fifth: The fifth "benefit" has already been discussed by us. The "Marston" was not concerned with the "mode of delivery". Delivery was the same whether a ship was there or not. As the witness Comyn said:

> "Assuming that this was an option in favor of the mill, whether they would deliver on wharf or on barges, and assuming that the mill delivered it to the barges, it would not make a bit of difference in the method of delivering to barges if the barges lay alongside the ship or did not lay alongside the ship; they would have nothing to do with loading that lumber on to the ship. In the case of delivery to barges, the obligation of the mill would cease, and it would have performed its part of the contract when it put the barges alongside the ship, and if there were no ship it would cease as soon as it was on the barges. It would cease as soon as the lumber was on the barges if they sold it on the barges. If the mill had an option to deliver to barges, and it exercised that option, the obligation of the mill would cease when the lumber was on the barges. After that time it would be the obligation of the buyer to take the lumber from the barges, they would have to load it from the barges on to the ship." (Record p. 90.)

VIII.

PLAINTIFF IN ERROR'S NINTH CONTENTION (Brief pp. 90-94).

Plaintiff in error contends that the judgment should be reduced by 15%.

This contention of plaintiff in error is based upon a claim that the contract was for "1,300,000 feet, 15% more or less". The wording of the contract was "1,300,000 feet B. M. 15% more or less to suit capacity of vessel" (Record p. 5). Judge Bean held "the contract names the quantity and the expression therein '15% more or less to suit capacity of vessel' would simply allow the specified quantity to be varied to that extent if the named vessel had been tendered as the receiving medium, but the failure to tender it would not relieve the defendant from making delivery if demanded of the specified quantity" (Record p. 61).

The privilege of varying the quantity within the limit 15% more or less in order to suit the capacity of the vessel was a privilege for the benefit of the buyer which, as pointed out above, the buyer could waive. The vessel not having been tendered, this privilege could not be exercised, and accordingly the specified quantity of 1,300,000 feet must stand.

The contract cannot be interpreted as giving either party an absolute option to a variation within the limit stated, but simply allows for a variation from the definite quantity stated within the prescribed limits in order to suit the capacity of the vessel, if a vessel should be tendered.

There is absolutely nothing in plaintiffs' letter of October 10, 1917 (Record p. 97), upon which plaintiff in error relies so strongly (brief p. 91). This letter was merely a demand by plaintiffs for the performance of the contract. In making this demand, and in order to give the defendant the benefit of every doubt, the demand was limited so as to give defendant an option to deliver 15% more or less, although the contract itself gave the defendant no such right. Defendant never complied with this demand. It cannot, therefore, now rely upon the privilege offered to the defendant by the plaintiffs at this time.

Nor is there anything in the passage quoted by the plaintiff in error (brief p. 91) from our brief before the trial court. Aside from the fact that this brief is not a part of the record and is not before this court, it is apparent that the quotation is absolutely in accord with our present position. If the vessel had been tendered and its capacity had been 15% less than 1,300,000 feet, then the defendant would have been obligated to deliver only that minimum amount, but in any and every event it was bound to deliver at least that much. Since the vessel was not tendered and since, as a matter of fact, its capacity was practically 1,300,000 feet (Record p. 304), this minimum cannot apply, and the defendant was obligated to deliver the specified quantity, 1,300,000 feet.

The cases cited by plaintiff in error (brief pp. 92 to 94) are clearly distinguishable.

In *Washington Lumber Co. v. Midland Co.,* 194 Pac. 777, the contract required the cars to be loaded to their

minimum capacity. There was no requirement that defendant load more than the minimum capacity. It was, of course, correct, therefore, to limit the recovery to the minimum capacity of the number of cars covered by the contract.

The other cases cited by plaintiff in error are simply cases where the contract allowed a variation within certain limits, without adding any qualification such as that in the present case, "to suit capacity of vessel". It is obvious that cases of this kind can be of no assistance in construing a contract like that involved in the present case. It will be noted, however, that a contract such as those treated in the cases cited is ambiguous, since it does not appear whether the option to select the precise quantity to be sold is to rest with the seller or with the buyer. Of course, if the option rests with the buyer, then, even if the present contract were of the same class as that construed in these cases, the judgment would have to be affirmed, since the plaintiff would have had the right to elect either a 1,300,000 board feet or the maximum of 1,495,000 feet.

While three of the cases cited assume that this option rests with the seller, without giving any reason for it, the last cited, *Consolidated Water Co. v. Louisville Herald,* 211 Ill. App. 569, holds that the option rests with the buyer and is, therefore, an express authority in our favor. A similar assumption was made in *Central Oil Co. v. Southern Refining Co.,* 154 Cal. 165, and the point has been directly decided this way in *Highlands Chemical Co. v. Matthews,* 76 N. Y. 145; *Ready v. Fulton Co.,* 179 N. Y. 399; 72 N. E. 317;

Farquhar Co. v. New River Co., 84 N. Y. S. 802, and *Dupont Co. v. United Zinc Co.,* 85 N. J. L. 416; 89 Atl. 992. Similar rulings and elaborate discussions of the reasons why such an option should rest with the buyer in cases similar on the facts to that at bar are found in *Taylor v. Niagara Bedstead Co.,* 102 N. Y. S. 173; *DeGrasse Paper Co. v. Northern N. Y. Coal Co.,* 179 N. Y. S. 788, and *Southern Publishing Association v. Clements Paper Co.,* 139 Tenn. 429; 201 S. W. 745.

Therefore, even if the contract is to be read as claimed by plaintiff in error in arguing this point, "1,300,000, 15% more or less", nevertheless, since the option in such a case rests with the buyer, the judgment must be supported. It is quite clear, however, that the contract cannot be given the reading suggested by plaintiff in error, and that the margin of variation was allowed solely in the event that a vessel was tendered in order to suit the capacity of the vessel. It was clearly not the intention to allow the seller to speculate on the market and, if it fell, to compel plaintiff to take 1,495,000 feet, but to refuse to deliver more than 1,105,000 feet on a rising market, such as actually existed.

It is respectfully submitted that the judgment must be affirmed.

Dated, San Francisco,
October 22, 1921.

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